

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:) Chapter 7 Case
) Number 87-11177

LEASE PURCHASE CORPORATION)

Debtor)

JAMES D. WALKER, JR., TRUSTEE FOR)

LEASE PURCHASE CORPORATION,)

VELSTAR ENTERPRISES, INC.,)

JOHN GINN ENTERPRISES, INC.)

MIG INVESTMENT CO., INC.,)

RAY MORRIS HOUSING CENTER, INC.,)

CHARLES FLANDERS HOMES, INC.,)

BOB WRIGHT HOMES, INC.,)

VELSTAR INSURANCE AGENCY, INC.,)

HARRY LUCAS HOMES, INC.,)

HUTCHINSON HOMES, INC.,)

WREN HOMES OF AUGUSTA, INC.,)

HUTCHINSON HOMES OF THOMSON,)

WREN HOMES OF THOMSON, INC.,)

BOB WRIGHT ENTERPRISES, INC.,)

TERRY STULL HOUSING CENTER, INC.,)

BILL KINLAW HOUSING CENTER, INC.,)

RALPH SCURRY HOMES, INC.,)

HUTCHCO LEASING CORP., INC.,)

NEW ENVIRONS OF SC, INC.,)

RAY RADFORD HOMES, INC.,)

HUTCHINSON HOMES OF SC, INC.,)

TOWN & COUNTRY HOMES, INC.,)

TOWN & COUNTY HOMES,)

MARSHALL KING HOMES, INC.,)

EARL LOWE HOUSING CENTER INC.,)

J. R. GOSNELL HOMES, INC.,)

WARNER ROBBINS HOUSING CENTER,)

PEGGY'S MOBILE HOMES, INC.,)

GARY SMOAK HOUSING SHOWPLACE,)

GREENWOOD HOUSING CENTER, INC.,)

FILED
at 3 O'clock & 22 min. P.M.
Date: 5-26-93

FIRST QUALITY HOUSING CENTER,)
INC., GLENN MANNING HOMES, INC.,)
JERRY SIMPKINS HOMES, INC.,)
TONY BRUNSON HOMES, INC.,)
ED EDWARDS HOMES, INC.,)
CHARLES RAGAN HOMES, INC.,)
LARRY FISCHER HOMES, INC.,)
LARRY SHORT HOMES, INC.,)
RAY SOLLIE HOMES, INC.,)
BOB BRUNSON HOMES, INC., AND)
JIMMY PHILLIPS HOMES, INC.)

Plaintiff)

vs.)

CIT FINANCIAL SERVICES)
CORPORATION AND CIT GROUP/
SALES FINANCING, INC.)

Defendants)

Adversary Proceeding
Number 90-1092

ORDER

Plaintiff, James D. Walker, Jr., in his capacity as Chapter 7 trustee for the bankruptcy estates of the captioned mobile home dealers, moves the court pursuant to Federal Rule of Bankruptcy Procedure 9023 to alter or amend an order entered in this adversary proceeding dated May 13, 1993. The May 13 order responds to a request by defendants, CIT Group/Sales Financing, Inc. and CIT Financial Corporation (collectively "CIT"), for a pretrial ruling "on the relevance of consumer notices of resale of consumer collateral (mobile homes) to CIT's right to charge losses against the collateral at issue in this case (the Reserves)" Proposed Pretrial Order, p. 23. Plaintiff challenges my

determination in the May 13 order that the notice provisions of Official Code of Georgia Annotated (O.C.G.A.) §10-1-36 are irrelevant in this case and my determination that under O.C.G.A. §10-7-22 the dealers are not discharged of their obligations under the dealer agreement by CIT's failure, if any, to give proper notice under O.C.G.A. §10-1-36 to mobile home purchasers, because each dealer consented in advance to any possible noncompliance with O.C.G.A. §10-1-36 by CIT.

Prior to the May 13 order, in support of the contention that "consumer notices" are relevant in this case, plaintiff made two arguments: 1) the dealers, or bankruptcy trustee, are "debtors" under O.C.G.A. §11-9-504(3), entitled under that subsection to notice of CIT's disposition of any repossessed mobile home, Plaintiff's Brief, filed March 12, 1993, pp. 2-10; and 2) CIT failed to give proper notice under O.C.G.A. §10-1-36 to mobile home purchasers in default, which in each such instance increased the dealer's or trustee's risk by barring their right as guarantor to collect a deficiency against the mobile home purchaser pursuant to O.C.G.A. §10-1-36, thereby discharging the dealer or trustee pursuant to O.C.G.A. §10-7-22. Plaintiff's Brief, pp. 10-13. Responding to these arguments and counter arguments by CIT, I determined that under Georgia law each dealer, the debtor-in-possession, or bankruptcy trustee is a "debtor" for purposes of O.C.G.A. §11-9-504(3), entitled to the required notice under that

subsection, May 13 order, pp. 5-9, and that consumer notices required by O.C.G.A. §10-1-36 are irrelevant insofar as O.C.G.A. §10-7-22 does not discharge the dealers by virtue of CIT's alleged failure to comply with O.C.G.A. §10-1-36 because the dealers consented in advance to such conduct. May 13 order, pp. at 11-13.

In the motion to alter or amend, plaintiff asserts that this court erroneously relied on definitions in O.C.G.A. §10-1-2 in noting that O.C.G.A. §10-1-36 does not apply to the dealers. May 13 order, p. 12 n. 8. Relying on definitions in O.C.G.A. §10-1-31, plaintiff now argues that the dealers, or the trustee, are entitled to the notice required under O.C.G.A. §10-1-36 and that to the extent CIT failed to provide such notice to the dealers or the trustee, CIT is absolutely barred from recovering a deficiency claim against the bankruptcy estates. See O.C.G.A. §10-1-36. Plaintiff argues my determination that each dealer consented in advance to CIT's possible noncompliance with O.C.G.A. §10-1-36 and that such consent precludes a discharge under O.C.G.A. §10-7-22 is in conflict with O.C.G.A. §10-1-37, which expressly renders unenforceable any attempt to waive the provisions of O.C.G.A. §10-1-36.

Upon review, plaintiff is correct that the definitions in O.C.G.A. §10-1-2 do not apply to the terms used in O.C.G.A. §10-1-36. O.C.G.A. §§10-1-1 - 10-1-16 is "The Retail Installment and Home Solicitation Sales Act," O.C.G.A. §10-1-1. The definitional section, O.C.G.A. §10-1-2, does not apply to O.C.G.A. §§10-1-30 -

10-1-41, the "Motor Vehicle Sales Finance Act," O.C.G.A. §10-1-30. The "Motor Vehicle Sales Finance Act" has its own definitional section in O.C.G.A. §10-1-31. Therefore, footnote no. 8, located on page 12 of the May 13 order, is incorrect. However, this does not change the result in the order of May 13 as it pertains to the issues presented. Although prior to the May 13 order the parties were given an opportunity to present their respective arguments regarding the relevance of "consumer notices," neither party addressed the issue of whether the dealers or the trustee, as opposed to mobile home purchasers, are entitled to notice under O.C.G.A. §10-1-36, and if so, the effect of CIT's failure, if any, to provide such notice. Concerning plaintiff's new argument that each dealer or the trustee is entitled to notice under O.C.G.A. §10-1-36, CIT will be afforded an opportunity to respond.

Plaintiff is mistaken that O.C.G.A. §10-1-37 bars my determination that each dealer consented in advance to CIT's possible noncompliance with O.C.G.A. §10-1-36 thereby precluding a discharge under O.C.G.A. §10-7-22. It is true that the provisions of O.C.G.A. §10-1-36 cannot be waived, O.C.G.A. §10-1-37; however, the May 13 order does not hold to the contrary. O.C.G.A. §10-1-37 states, "Any waiver of this article [Article 2 of Chapter 1 of Title 10] shall be unenforceable and void." (Emphasis added). O.C.G.A. §10-7-22 is part of Article 2 of Chapter 7 of Title 10, beyond the purview of O.C.G.A. §10-1-37. Under O.C.G.A. §10-7-22, "[a]ny act

of the creditor . . . which injures the surety or increases his risk or exposes him to greater liability shall discharge him. . . ." Georgia case law is clear that a discharge under O.C.G.A. §10-7-22 is unavailable if the surety consents in advance to conduct which otherwise would entitle the surety to such a discharge. E.g., Panasonic Industries Co. v. Hall, 197 Ga. App. 860, 399 S.E.2d 733, 734 (1990); see also Regan v. U.S. Small Business Admin., 926 F.2d 1078, 1082 (11th Cir. 1991). Each dealer in this case agreed (in paragraph 7 of the dealer agreement) that "[i]f we [the dealer] default on any obligation [under the dealer agreement] we will be responsible for any loss incurred by you [CIT] in selling . . . any repossessed or recovered mobile home at public or private sale . . . held with or without notice." Each dealer consented in advance to CIT's sale "with or without notice" of repossessed mobile homes, the conduct plaintiff now contends increased the dealers' or trustee's risk by barring the dealers or trustee pursuant to O.C.G.A. §10-1-36 from collecting a deficiency claim from the defaulting mobile home purchaser. Assuming CIT failed to comply with O.C.G.A. §10-1-36 and that this increased the dealers' or trustee's risk of liability, the dealers consented to the conduct. To the extent that any dealers, debtors-in-possession, or the trustee would have been entitled to a discharge under O.C.G.A. §10-7-22 by virtue of CIT's alleged conduct, the dealers waived their right to such a discharge. This does not imply, however, that the above quoted language from

paragraph 7 of the dealer agreement effects a legally binding waiver of the provisions of O.C.G.A. §10-1-36.

It is therefore ORDERED that plaintiff's motion to alter or amend the order entered in this adversary proceeding dated May 13, 1993 is granted as follows: footnote No. 8 is stricken;

further ORDERED that CIT has thirty (30) days from the date of this order to respond by letter brief to plaintiff's contention that the dealers, or the trustee are entitled to notice under O.C.G.A. §10-1-36 and that the failure of CIT to provide such notice bars CIT from recovering any deficiency claim on the subject installment contract.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 26th day of May, 1993.